however, a corporation having a surplus in hand purchased stocks outstanding by note. It was held that, on subsequent insolvency of the company the holder could not come in with general creditors to claim a dividend from the company upon his claim. *In re Fechheimer-Fishel Co.*, 50 N. Y. L. J. 2853 (C. C. A., 2nd Circ.). It is possible that there were elements of fraud in the transaction not fully disclosed by the report which justified this result. Unless there were such facts, if we concede the power of the corporation to purchase its own stock, there seems no reason why the creditors should have been allowed to avoid this transaction.

THE RIGHT TO TAKE FISH AND GAME IN NAVIGABLE NON-TIDAL WATERS. — Since it is often said that only those waters in which the tide ebbs and flows are navigable under the common law of England, it is important to observe carefully the technical meaning of the word navigable when so used. At an early date title to the land beneath the sea and tidal rivers was conceived to be in the king,[1] whereas title to the land under inland waters where the tide did not ebb and flow, was in the private riparian proprietors.[2] Perhaps because tide water in England included nearly all water navigable in fact, or because of the Lord Admiral's jurisdiction over shipping in tidal waters,[3] the term "navigable water" came to be loosely used as a synonym for tide water.

While no one can obtain absolute property in fish and game except by reduction to possession,[4] and therefore their ownership while uncaptured does not go with the realty; the right to take creatures *feræ naturæ*, transiently upon land, is recognized as a valuable property right incident to its ownership.[5] So in ancient times, the right to fish in the sea was the exclusive prerogative of the king as lord of the soil; but either by Magna Charta, or by the gradual encroachment upon royal prerogative as the representative character of the sovereign became recognized, the king's right to the sea came to be regarded as held in trust for the public, and the right to fish became free and common to all.[6] This right though arising independently of the public ownership of the soil, thus chanced here to be co-extensive with the right of navigation. In English non-tidal streams, however, the exclusive right of fishery is in the riparian proprietor of the soil.[7] Inasmuch as these inland waters

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is no fraud in the transaction as against creditors except as it releases the shareholder from individual liability and that creditors cannot set aside the transaction to any greater extent and cannot claim the purchase price received for the shares.

[1] HALE, DE JURE MARIS, cap. 4.

[2] *Ibid.*, cap. 1.

[3] See Ilchester *v.* Raishleigh, 61 L. T. N. S. 477, 479.

[4] See Geer *v.* Connecticut, 161 U. S. 519, 16 Sup. Ct. 600.

[5] So that a statute requiring a license for non-resident hunters is unconstitutional as applied to non-resident landowners. State *v.* Mallory, 73 Ark. 236, 83 S. W. 955. And see cases cited in note 14, *infra*.

[6] See 2 FARNHAM, WATERS AND WATER RIGHTS, § 368.

[7] Pearce *v.* Scotcher, L. R. 9 Q. B. D. 162; Smith *v.* Andrews, [1891] 2 Ch. 678; Murphy *v.* Ryan, Ir. R. 2 C. L. 143. See Reece *v.* Miller, L. R. 8 Q. B. D. 626. As to fowling see Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139.

are subject to a public easement of navigation,[8] it is clear that the right to hunt and fish has no connection with the right of navigation, but is an incident of the land.

Thus in those American jurisdictions where the riparian abutter on a non-tidal stream owns to the *medium filum*[9] it should follow that on such streams the public have no right to take fish and game.[10] But the fact that the public right to take fish and game co-exists with the right of navigation in tidal or so-called "navigable" waters has led some courts to consider these rights inseparable.[11] Such a misconception is indicated in the result of a recent Wisconsin decision, holding that the public as an incident to the right of navigation, has a right to take game, over the privately owned bed of a navigable fresh water stream.[12] *Diana Shooting Club* v. *Husting*, 145 N. W. 816 (Wis.).

Not only is there no historical connection between the right to hunt and fish and the right of passage, but there is also no basis on reason or analogy for the connection. Although other servitudes in the nature of easements may be annexed by custom or prescription to an easement of passage,[13] the right to take fish and game cannot be thus annexed because it is not an easement but a *profit à prendre*, which the public cannot acquire by customary or prescriptive user.[14] Aside from annexed incidents, a public right of passage upon land includes only those rights reasonably necessary for the enjoyment of the easement.[15] Accordingly one who uses a public way as a vantage ground for observing the training of horses in adjoining fields,[16] or for launching profanity at the ser-

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[8] HALE, DE JURE MARIS, caps. 1, 2, & 3. The cases in the preceding note all concern waters navigable in fact.

[9] Kinkead *v.* Turgeon, 74 Neb. 573, 109 N. W. 744; Brown *v.* Chadbourne, 31 Me. 9; Farris *v.* Bentley, 141 Wis. 671, 124 N. W. 1003; Hardin *v.* Jordan, 140 U. S. 371, 11 Sup. Ct. 808; Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Lattig *v.* Scott, 17 Idaho 506, 107 Pac. 47; Cobb *v.* Davenport, 32 N. J. L. 369; Middleton *v.* Pritchard, 4 Ill. 510; June *v.* Purcell, 36 Oh. St. 396.

[10] In some American jurisdictions where the bed of streams navigable in fact is owned by the state, the right of fishery is of course public. Carson *v.* Blazer, 2 Binn. (Pa.) 475. The rule applied to the Great Lakes is the same as that applied to tide waters. Ainsworth *v.* Munoskong Club, 153 Mich. 185, 116 N. W. 992; Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103; Sloan *v.* Biemiller, 34 Oh. St. 492.

[11] Forrestier *v.* Johnson, 164 Cal. 24, 127 Pac. 156. In Ohio, seemingly, public fishing, but not public fowling, is incident to navigation. Winous Point Shooting Club *v.* Bodi, 20 Oh. Cir. Ct. R. 637.

[12] Art. 9, § 1, of the Wisconsin Constitution provides that navigable streams "shall be common highways and forever free . . . without any tax impost or duty therefor." Under this section a statute declaring a public right to take fish in all navigable streams had previously been held valid. Willow River Club *v.* Wade, 100 Wis. 86, 76 N. W. 273. It is submitted that this section applies only to navigation and that such a statute in effect is a deprivation of property without due process of law. See 2 FARNHAM, WATERS AND WATER RIGHTS, § 368 c; *cf.* Hartman *v.* Tresise, 36 Colo. 146, 84 Pac. 685.

[13] State *v.* Laverack, 34 N. J. L. 201, 206.

[14] Gatewards case, 6 Coke, 59 b; Ordeway *v.* Orme, 1 Bulst. 183; Johnston *v.* O'Neill, [1911] A. C. 552; Smith *v.* Andrews, [1891] 2 Ch. 678; Murphy *v.* Ryan, Ir. R. 2 C. L. 143; Cobb *v.* Davenport, 33 N. J. L. 223; Beach *v.* Morgan, 67 N. H. 529, 531, 41 Atl. 349, 350.

[15] Woodruff *v.* Neal, 28 Conn. 165; Stackpole *v.* Healy, 16 Mass. 33; Cole *v.* Drew, 44 Vt. 49.

[16] Hickman *v.* Maisey, [1900] 1 Q. B. 752.

vient owner,[17] or for frightening [18] or shooting [19] his game, becomes a trespasser upon the servient tenement. And one in the pretended exercise of an easement of navigation over privately owned subaqueous land, who takes ice [20] from the surface or gravel [21] from the bed of the stream is likewise clearly a trespasser. The argument that as fish and game have no owner, anyone has a right to take them wherever he has a right to be,[22] is thus answerable in that the taker has no right on the highway for that purpose. On these grounds the majority of the courts have reached a result opposed to that of the principal case.[23]

THE DEVELOPMENT OF WHITBY *v.* MITCHELL. — The recent case of *In re Park's Settlement*, [1914] 1 Ch. 595,[1] contains a new application of the rule in *Whitby* v. *Mitchell*,[2] against limiting land to an unborn person for life, with remainder to the issue of that person, which, according to *In re Nash*,[3] is the modern English form of the old rule against a possibility upon a possibility. In *Park's Settlement*, land was limited (in the events that happened) to the use of John Foran for life, and after his death, if he left a widow surviving him, to the use of such widow for her life, and after her decease, if he left issue surviving him, to such issue or such of them as should attain the age of twenty-one years. John Foran was a bachelor at the date of the deed and afterwards married and had one child. His wife and child survived him, and on the death of his wife, the validity of the limitation to his issue was questioned on the ground that, as he, being a bachelor, might have married a lady unborn at the date of the deed, the limitation of a remainder to children who might be born of her as his wife, following a limitation to her for life, offended against the rule. Eve, J., held that the contention was well founded, and that the limitation to the issue was void. If this is a correct application of the rule, it seems to open up the way to new and unexpected catastrophes. It does not seem to be material that John Foran was a bachelor, for, if he had been married and his wife and child had been living at the date of the deed, it was possible that they might have died, and that another wife (unborn at the date of the deed) and another child might have survived him. And, if the child of the first marriage in fact survived, he could not take under the limitation, because, until the event, it was possible that he might have died, and a child of the second marriage, and not he, might have survived. As the

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[17] Adams *v.* Rivers, 11 Barb. (N. Y.) 390.
[18] Harrison *v.* Rutland, [1893] 1 Q. B. 142.
[19] The Queen *v.* Pratt, 4 E. & B. 860; L. Realty Co. *v.* Johnson, 92 Minn. 363, 100 N. W. 94.
[20] Washington Ice Co. *v.* Shortall, 101 Ill. 46.
[21] Archer *v.* Greenville Sand & Gravel Co., 34 Sup. Ct. 567.
[22] See dissent in Sterling *v.* Jackson, 69 Mich. 488, 519, 37 N. W. 845, 861.
[23] Hunting — Schulte *v.* Warren, 218 Ill. 108, 75 N. E. 783; Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845; State *v.* Shannon, 36 Oh. St. 423; fishing — Hooker *v.* Cummings, 20 Johns. (N. Y.) 90; Adams *v.* Pease, 2 Conn. 481.

[1] The case is also reported 58 Sol. J. 362.
[2] 42 Ch. D. 494, 44 Ch. D. 85 (1890).
[3] [1910] 1 Ch. D. pp. 9–10.